Supreme Court, U.S.
FILED
JAN 11 1983
ALEXANDER L. STEVAS
CLERK

No. 82-598

In the Supreme Court of the United States

OCTOBER TERM, 1982

IRA T. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the value of stolen property was properly aggregated so as to reach the $5,000 jurisdictional minimum under 18 U.S.C. 2314 and 2315.

2. Whether petitioner was prejudiced by the district court's refusal to charge the jury concerning the credibility of a drug addict witness.

3. Whether the district court properly refused to suppress stolen art objects seized from petitioner's home pursuant to a search warrant.

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OPINION

The opinion of the court of appeals (Pet. App. A-1 to A-20) is reported at 692 F.2d 658.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1982. A petition for rehearing was denied on July 27, 1982 (Pet. App. C-1 to C-2). The petition for a writ of certiorari was filed as of September 7, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Kansas, petitioner was convicted on one count of violating 18 U.S.C. 2315 by receiving stolen goods that were a part of interstate commerce, and on one count of violating 18 U.S.C. 371, by conspiring to transport stolen goods in interstate

commerce, a violation of 18 U.S.C. 2314. Petitioner was sentenced to concurrent two-year terms of imprisonment on each count and was fined $10,000 on each count. The court of appeals affirmed. Pet. App. A-1 to A-20.

1. In 1974, petitioner met Gerrold Stevens and began purchasing clothes and art objects from him. Tr. 675-676. Petitioner subsequently met Stevens' half-brother, Marvin Gabb. Tr. 13, 683-684. Gabb was a shoplifter, specializing in shoplifting art objects. Stevens operated as a fence for Gabb and other shoplifters. Tr. 7, 12-13.

Gabb first met petitioner in December 1977, when Stevens brought petitioner to a motel room to examine articles that Gabb had stolen in Phoenix. At his first meeting with Gabb, petitioner purchased at least one art object. Tr. 18-21, 25-26.

During the summer of 1979 Gabb sold a piece of stolen Georgian silver directly to petitioner, by-passing Stevens.[1] This caused substantial friction between Gabb and Stevens, which resulted in Gabb's decision to sell his stolen goods directly rather than using Stevens as a fence. In January 1980 Gabb began selling stolen art objects to petitioner on a regular basis, beginning with the sale of several art objects that Gabb had stolen during a trip to Phoenix. Thereafter, through mid-September 1980, Gabb sold at least 70% of the art objects that he stole—more than 60 pieces—to petitioner. Petitioner paid Gabb approximately $2,000 a week. Petitioner and Gabb occasionally discussed the stolen nature of the art objects, and on at least two occasions petitioner suggested objects that Gabb should steal. Tr. 15-16, 26-29, 32-43.

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[1] The silver still had a price tag—$6,500—on it when petitioner purchased it from Gabb for $1,300. Tr. 32.

2. In August 1980 Gabb was arrested in St. Louis, Missouri, on a charge of shoplifting. Tr. 298-299. The investigation related to Gabb's arrest also caused law enforcement officials to obtain a search warrant for petitioner's home, which they executed on September 18, 1980. Tr. 506-509. According to one of the officers who participated in the search, petitioner's house "looked like a museum." Tr. 515. In addition to the items they seized, the officers photographed several art objects that were located in the house. Tr. 516. These photographs were then shown to dealers who had reported art thefts, who identified many of the photographed objects as having been stolen from them. Tr. 224, 282-283, 294, 346, 349-350, 417, 437-438, 542, 564, 631-632. A second search warrant was obtained and executed on October 9, 1980, as a result of which 96 additional art objects were seized. Tr. 559, 566.

ARGUMENT

1. Petitioner contends (Pet. 21-26) that the $5,000 minimum for federal jurisdiction over his offenses may not be satisfied by aggregating the value of the individual stolen art objects that he received. There is no merit to this claim.

The statutory scheme that imposes federal criminal sanctions for dealing in stolen property specifically provides (18 U.S.C. 2311) that "the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof." As this Court noted in *Schaffer* v. *United States*, 362 U.S. 511, 517 (1960), "[a] sensible reading of the statute properly attributes to Congress the view that where the shipments have enough relationship so that they may properly be charged as a single offense, their value may be aggregated." Accord, *United States* v. *Tobin*, 576 F.2d 687, 693 (5th Cir. 1978); *United States* v. *Drebin*, 557 F.2d 1316, 1328 &

n.19-1329 (9th Cir. 1977); *United States* v. *Jones*, 432 F. Supp. 801, 802 (E.D. Pa. 1977), aff'd *sub. nom. United States* v. *Moore*, 571 F.2d 154 (3d Cir.), cert. denied, 435 U.S. 956 (1978). Petitioner does not dispute that the aggregate value of the items listed in the indictment is greatly in excess of $5,000. Pet. App. A-6. Hence, the jurisdictional minimum for application of 18 U.S.C. 2314 and 2315 was satisfied.

Petitioner asserts, however, that there was no "plan or agreement" between him and Gabb and that therefore each sale must be viewed as a separate transaction not subject to aggregation for purposes of the $5,000 jurisdictional amount. This assertion is belied by petitioner's conviction for conspiracy to transport stolen art objects in interstate commerce.[2] Gabb's testimony (Tr. 27-43) amply supports the finding of an agreement between petitioner and Gabb for the theft, interstate transportation, and delivery to petitioner of stolen art. Tr. 27-43.

Finally, petitioner's concern about "creeping federalism" (Pet. 25-26) is not apposite to his case. Even if the value of the stolen merchandise alleged in the indictment could not be aggregated, certain stolen items petitioner received were individually valued at more than $5,000—one stolen art object delivered to petitioner still bore a $6,500 price tag (see note 1, *supra*).

2. Petitioner argues (Pet. 26-30) that he was prejudiced by the district court's refusal to charge the jury concerning the credibility of a government witness who is a narcotics addict. This claim also lacks merit.

Gabb, the art thief who sold to petitioner, had been a heroin addict since 1956. He testified at trial that he

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[2] Although no co-conspirator was identified by name in the indictment, Gabb was alleged to have participated in three of the overt acts charged in the conspiracy count. Tr. 771-772. No other individual (apart from petitioner) was named in the indictment.

shoplifted in order to support his drug habit. He also stated that when he agreed to testify against petitioner he was given immunity for all non-violent crimes he had committed in the District of Kansas and was placed in the federal witness protection program. Tr. 4-12.[3] The district court instructed the jury generally concerning credibility. Tr. 790. In addition, the court specifically cautioned the jury concerning the special scrutiny that should be given to the testimony of a paid or immunized witness, or a witness who is an accomplice, or a convicted felon, each of which pertained to Gabb. Tr. 788-789.[4]

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[3] In addition, Gabb testified, federal officials had agreed to try to help him with respect to non-violent property crimes he had committed outside the District of Kansas if he would help recover the property. Tr. 4-5. Gabb also testified concerning prior convictions for which he had already served time. Tr. 8-9.

[4] Instruction Number 28 provided (Tr. 788-789):

> An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of an accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence. However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care.
>
> You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt.

Instruction Number 29 provided (Tr. 789):

> The testimony of a witness who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the witness' testimony has been affected by

The trial court declined, however, to give the additional instruction requested by petitioner concerning the special care with which the testimony of a narcotics addict should be considered (see Pet. 26-27). The court of appeals affirmed. It held (Pet. App. A-15) that although, "[a]s a general rule, prudence dictates the giving of an addict instruction whenever the prosecution has relied upon the testimony of a narcotics addict," petitioner was not prejudiced by the district court's failure to do so here because the other credibility instructions given by the court sufficiently alerted the jury to the special care and caution it should use in evaluating Gabb's testimony.

As the court below observed (Pet. App. A-11), several courts of appeals have spoken approvingly of the use of "addict-informant" instructions. See, e.g., *United States* v. *Hopkins*, 518 F.2d 152, 154-155 (3d Cir. 1975); *United States* v. *Lee*, 506 F.2d 111, 122 (D.C. Cir. 1974), cert. denied, 421 U.S. 1002 (1975); *Government of the Virgin Islands* v. *Hendricks*, 476 F.2d 776, 779-780 (3d Cir. 1973); *United States* v. *Collins*, 472 F.2d 1017, 1018-1019 (5th Cir. 1972), cert. denied, 411 U.S. 983 (1973); *United States* v. *Kinnard*, 465 F.2d 566, 569-572 (D.C. Cir. 1972); *United States* v. *Griffin*, 382 F.2d 823, 828-829 (6th Cir. 1967). Whether the failure to give such an instruction requires reversal, however, has been held to turn on whether the witness's testimony was corroborated and on whether other credibility instructions were given that sufficiently apprised the jury of the need to weigh the testimony carefully.

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interest, or by prejudice against a defendant.

Instruction Number 30 provided (Tr. 789):

> When it has been shown that a witness has previously been convicted of a felony, you are to determine his credibility and the weight to be given his testimony the same as you would the testimony of any other witness. The fact that a witness has been convicted of crime may be considered by you in determining what credit you should give him as a witness and what weight you will allow his testimony.

See *United States* v. *Hopkins*, *supra*, 518 F.2d at 154-155; *United States* v. *Gregorio*, 497 F.2d 1253, 1261-1263 (4th Cir.), cert. denied, 419 U.S. 1024 (1974); *Government of the Virgin Islands* v. *Hendricks*, *supra*, 476 F.2d at 779; *United States* v. *Collins*, *supra*, 472 F.2d at 1019; *United States* v. *Kinnard*, *supra*, 465 F.2d at 572; *United States* v. *Griffin*, *supra*, 382 F.2d at 828-829.

In petitioner's case, the testimony of the addict witness Gabb was amply corroborated by the stolen art objects that had been seized from petitioner's home. Moreover, the other credibility instructions given by the district court—concerning the special care that is to be employed in evaluating the testimony of an accomplice, an informant, or a convicted felon, as well as the general credibility instruction—were clearly sufficient to alert the jury to the caution with which it should receive Gabb's testimony.[5] In these circumstances, the court of appeals correctly ruled that petitioner suffered no prejudice from the district court's failure to give the requested addict witness instruction.[6]

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[5] In addition, the fact of Gabb's narcotics addiction, as well as his arrangements with the authorities and his prior convictions, were fully explored on both direct and cross examination (Tr. 4-12, 102-141). Contrary to petitioner's suggestion (Pet. 29-30), the lower federal courts have held that where the fact of addiction is brought out during testimony and where other credibility instructions alert the jury to the need for special care in evaluating the addict witness's testimony, the trial court's failure to give an additional instruction specifically concerning the credibility of an addict witness does not require reversal. See, e.g., *United States* v. *Hopkins*, *supra*, 518 F.2d at 154-155.

[6] Contrary to petitioner's assertion (Pet. 29), the decision in this case creates no conflict among the circuits that requires resolution by this Court. The court below *agreed* with the decisions on which petitioner relies (Pet. 28-29) that, "[a]s a general rule, prudence dictates the giving of an addict instruction whenever the prosecution has relied upon the testimony of a narcotics addict" (Pet. App. A-15). It merely held that in the par-

3. Petitioner finally contends (Pet. 31-34) that the district court erred in failing to suppress the stolen art objects seized from his home. There is no substance to this claim.

Petitioner's home was searched on two occasions, on September 18, 1980, and on October 9, 1980, both times pursuant to warrant. During the first search, a number of art objects not listed in the warrant were in plain view and were systematically photographed. When several of these items were later identified as stolen, they were seized pursuant to a second search warrant. Petitioner now complains (Pet. 33-34) that the inventory and photographing of the art objects during the first search was an impermissible general search that tainted the subsequent seizure of those items pursuant to the second warrant.

The district court and the court of appeals disposed of petitioner's suppression motion on the ground that it was made after the commencement of trial and therefore was untimely under Fed. R. Crim. P. 12(b)(3) and (f) (Pet. App. A-18 to A-20). As the court of appeals noted (*id.* at A-19), "the purpose of the rule requiring that motions to suppress be made prior to trial is to provide orderly proceeding during the trial of a case by eliminating from the trial 'disputes over police conduct not immediately relevant to the question of guilt.'" *Mesmer* v. *United States*, 405 F.2d 316, 318-319 (10th Cir. 1969), quoting *Jones* v. *United States*, 362 U.S. 257, 264 (1960). It is clear from the Rule itself and well settled by judicial interpretation that the failure to make a timely motion to suppress constitutes a waiver of the issue. *United States* v. *Scavo*, 593 F.2d 837, 844 (8th Cir. 1979); *United States* v. *Hare*, 589 F.2d 242,

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ticular circumstances of this case the failure to give such an instruction did not prejudice petitioner. The validity of that fact-bound determination clearly does not warrant this Court's intervention.

243 (5th Cir. 1979); *United States* v. *Bridwell*, 583 F.2d 1135, 1139-1140 (10th Cir. 1978); *United States* v. *Echols*, 577 F.2d 308, 311 (5th Cir. 1978); *United States* v. *Wood*, 550 F.2d 435, 439 (9th Cir. 1976); *United States* v. *Schwartz*, 535 F.2d 160, 163 (2d Cir. 1976). While the district court was empowered to find good cause for not holding petitioner to his waiver if such existed (see Fed. R. Crim. P. 12(f)), it did not do so, and the court of appeals agreed (Pet. App. A-20) that there was "no evidence that [petitioner] lacked the opportunity to make his motion in a timely manner." That concurrent, fact-bound determination does not warrant review by this Court.

In any event, there is no merit to petitioner's Fourth Amendment claim. Petitioner does not dispute that probable cause existed for the issuance of the first warrant. See also affidavit of James K. Weber, Special Agent, Federal Bureau of Investigation, in support of search warrant issued Sept. 17, 1980. Once inside petitioner's house, the officers were entitled to observe items, such as the art objects, that were in plain view. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). "Police officers are not required to ignore the significance of items in plain view even when the full import of the object cannot be positively ascertained without some examination." *United States* v. *Roberts*, 619 F.2d 379, 381 (5th Cir. 1980). See also *United States* v. *Berry*, 423 F.2d 142, 144 (10th Cir. 1970). Since there was a great likelihood that many of these items were also stolen, the officers would have been derelict in their duty had they not taken some measure to aid further investigation. The taking of photographs, which did not constitute a further search but merely a means of preserving the recollection of what was already in plain view, was surely reasonable in the circumstances.[7] Pe-

[7] Indeed, the facts known to the officers might well have justified an immediate seizure on the basis of the probability that most of the objects were stolen.

titioner does not, nor can he, claim that once the photographed items were identified as stolen, there did not exist probable cause in support of the issuance of the second warrant.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1983